

THE PROPOSED NEW CODE OF ADMINISTRATIVE PROCEDURE

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It is pleasant to discuss this subject with Whitney Harris.** I want to thank him both for this delightful journey and for his having solved the problem, that was worrying me for awhile, of effecting the landing back on earth, which is one of the unsolved problems, as I understand, of space travel, and which I thought might be confronting me when I got up to talk about this subject.

I am pleased that Whitney Harris has found celestial sanction for his views. I am not sure that they are entirely appropriate to the earthly situation with which I think we have to deal.

I am under the handicap, after a ten-year period of growing disillusionment with government, of defending laws that will permit expertness to operate. Mine is not a popular theme these days. I don't know whether the ten years are going to be expanded into another ten before we again become more friendly toward the operations of the executive branch.

As of today it is not only the business interests, whom we are accustomed to look upon as somewhat in opposition to government, who are quite skeptical of it, but also a goodly number of ex-New Dealers and people who are commonly denominated liberals, who are disillusioned. Some have personally turned from advocacy of what we used to call "The Administrative Process" to advocacy of very strict controls over that process and to a real fear of the operation of government agencies. In part this is so because of the extension of executive power over the personal freedoms of the individual. We are dealing now with administrative processes that sometimes very directly and seriously bear on those personal freedoms, as well as with administrative processes that affect business. All of us agree, I think, that there must be safeguards, especially for these personal freedoms, in connection with whatever administrative processes are maintained. None of us wants unfairness in the administrative operations of government toward any interests with which government deals.

In relation to this matter of fairness the process of compromise, I suppose, is inevitable. We sacrifice certain possible protections for private interests so that government may accomplish its regulatory tasks.

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† *This article consists of remarks before the Round Table on Administrative Law at the 1957 annual meeting of the Association of American Law Schools.* [Ed.]

** See Harris, *A Federal Code of Administrative Procedure*, 19 OHIO ST. L.J. 415 (1958). [Ed.]

Conversely, we set up some fairly strict procedural safeguards for criminal defendants in the Bill of Rights, unquestionably adding to the difficulty of convicting of crime, because of the importance of protections to freedom and the purity of criminal justice. The line between safeguards and swift effectiveness is drawn differently in relation to different governmental functions.

In relation primarily to government regulation of economic activity we have drawn the line quite carefully, especially in the Administrative Procedure Act. The questions we have before us now in considering the proposed Code of Administrative Procedure is whether we should move the line to provide more strict safeguards against administrative unfairness and abuse, and whether impaired governmental effectiveness would result if we did. I submit that if we look forward realistically we should discern grave cause to question the wisdom of proceeding in all-out fashion to impose an additional elaborate set of safeguards on federal administrative processes as a whole. We are faced in the years ahead with the prospect of augmented public expenditures for armaments, such as may result in shortages of critical materials and manpower and in other economic difficulties. At the same time we are committed to maintaining a high-consumption economy. Financial problems involving measures to deal with inflation and the like are almost certain to result. The international situation is likely to generate additional measures to protect national security and, therefore, to deal with individuals in drastic ways. The growth of population will give rise to added problems of public health and safety. The government, therefore, it seems to me, cannot escape undertaking added tasks of a regulatory nature, some of them bearing on business enterprise and others bearing on personal freedom.

We will not be able to operate these added governmental processes successfully if we are going to tie them down by cumbersome procedures that will impair their effectiveness more than is really useful in protecting the essential private interests that stand in need of safeguards. Especially in relation to the functioning of government in economic matters, it seems to me we must cast the balance more largely in favor of the effectiveness of administrative processes than the proposed code appears to do.

One faces at the outset the question whether it is a good idea at this time to replace the Administrative Procedure Act¹ with an entire new statute. The act was, of course, the subject of a similar controversy itself, and many thought that it would have been better not to enact a general statute laying down procedural requirements for all of the administrative functions of the federal government. Be that as it may, as of the time the controversy was under way, I don't suppose any of us, in the light of what has happened since, would advocate a repeal of the

¹ 60 STAT. 237 (1946), 5 U.S.C. §§1001-11 (1952).

Administrative Procedure Act and a return to agency independence in matters of procedure, subject only to the particular statutes under which the various agencies operate.

I think the Administrative Procedure Act has made a real contribution to administrative processes and that the desirability of general legislation has been demonstrated. Even if that is not true, institutions have a way of developing and of rendering it all but impossible to return to the conditions of some years before. So we are going to have either the Administrative Procedure Act or something that will take its place, and I personally have no quarrel with the view that it should be so.

When it comes to replacing the act with another statute, I think it is desirable to recognize at once that the Administrative Procedure Act is not well drafted. I think it was poorly drafted in the beginning because the bill had too many hortatory and unclear provisions, and that it deteriorated additionally as it underwent the compromises to which Whitney Harris referred. If we keep it, we keep it subject to the resulting handicaps. On the other hand, a large volume of litigation and of reported judicial decisions has developed around the act as it stands. We know where we are heading in respect to a good many of its provisions. If we replace it now with a new statute, we will have to junk a good part of this development and start over again. Having a particular personal disposition in relation to such matters, I tend to favor going to considerable lengths to render enactments orderly and well expressed and to sacrifice some other values to this end if need be. I am friendly, therefore, to the idea of replacing the present act with a new one, provided the new one can be good, and to accepting some consequent uncertainty for a time.

The proposed code is an improved product from the standpoint of sheer draftsmanship. It is well worded and contains a more nearly complete solution to procedural problems than the Administrative Procedure Act embodies. The Code also contains, in my view, desirable changes in a good many of the provisions of the Administrative Procedure Act. The provisions for public information² are considerably superior to those in the act³ and quite thorough in their coverage. It seems to me, too, that rule-making proceedings are better provided for in the proposed code⁴ than in the act.⁵ By "rule-making," I mean the formulation of general regulations.

The enlarged powers which the proposed code would confer upon the presiding officers in formal administrative hearings⁶ seem to me to make up a better body of authority in the hands of that officer than the

² Proposed code, §1002.

³ 60 STAT. 238 (1946), 5 U.S.C. §1002 (1952).

⁴ Proposed code, §1003.

⁵ 60 STAT. 238 (1946), 5 U.S.C. §1003 (1952).

⁶ Proposed code, §1006(b).

Administrative Procedure Act provides.⁷ The provision of the Code for official notice⁸ seems also to be better than that in the Administrative Procedure Act.⁹

The judicial review provisions of the Code¹⁰ would accomplish two improvements: (1) ambiguities with regard to the availability of judicial review for various types of administrative action would be removed, and (2) the procedures for judicial review would be simplified. Under these provisions we would eliminate once and for all some of the silly difficulties in the way of judicial review that have stemmed from the indispensable party rule. There would be one simple type of review proceeding available where specific statutory modes of review had not been prescribed. I question, however, whether it is wise to extend judicial review to all agency actions not now reviewable, as the Code would do except where review is "expressly precluded" by statute.¹¹

I come then to major issues raised by the Code, as to which I either feel definitely in opposition to what the Code provides or have grave questions. Let me immediately, however, disclaim the capacity to decide finally, even for myself, with regard to some of these issues. They are complex, and we would do well to preserve an open mind with regard to them.

One of the points as to which I have considerable doubt is the changed definition of rule-making, to which Whitney Harris referred. You know, of course, that the Administrative Procedure Act now includes in the definition of "rule-making" the formulation of agency statements not only of general application and future effect, but also of "particular" application and future effect,¹² so that even an injunctive type of order would, according to the present wording, come under rule-making. Actually, an injunctive type of order does not, for historical reasons, come within the definition; but rate orders directed to particular carriers, reorganization orders, and so forth, are in the rule-making category under the present act. The reason, as I suppose most of us here know, is that the Administrative Procedure Act proposal imposed stricter requirements on administrative adjudication of the record type than on rule-making of the same variety, and the agencies, notably the Interstate Commerce Commission, which were engaged in utility regulation objected to following the stricter adjudicative procedure. The problem was solved by extending the definition of rule-making and correspondingly narrowing the definition of "adjudication" so as to bring the proceedings in question into the rule-making category.

Previously it had not been part of the thinking of lawyers that

⁷ 60 STAT. 241 (1946), 5 U.S.C. §1006(b) (1952).

⁸ Proposed code, §1006(e).

⁹ 60 STAT. 241 (1946), 5 U.S.C. §1006(d) (1952).

¹⁰ Proposed code, §1009.

¹¹ Proposed code, §1009(c).

¹² 60 STAT. 237 (1946), 5 U.S.C. §1001(c) (1952).

the issuance of a rate order directed to a single carrier, or a reorganization order, would be rule-making. The Administrative Procedure Act has introduced an artificial conception of rule-making. Abstractly, I think it would be better to go back to the traditional concept embracing only general prescriptions and to differentiate procedure accordingly. The truth is, however, that we do not live in a world where conceptual logic is, or should be, all-controlling. We have had some history under the act now, and the processes of many of the agencies have been worked out with relation to the present distinction between rule-making and adjudication. Is it wise now to change the distinction and to start over again in defining the procedures for various kinds of agency operations? I don't know the answer to that, and I will leave the matter right there without expressing further thoughts about it.

It should be said that the proposed code, while it would subject some of the proceedings which are known as rule-making under the Administrative Procedure Act to the stricter requirements of adjudicative procedure, makes an exception to one of these requirements for these same proceedings. The Code's proposed new requirement as to evidence, which I will mention shortly, would not apply to them.

The proposed code would require an initial decision by the presiding officer in adjudication, which would become the agency decision unless changed by the agency.¹³ In rule-making based on the record after opportunity for hearing, an intermediate decision prepared by someone other than the presiding officer might be substituted.¹⁴ The provision for separation of functions would also not apply in rule-making proceedings as more narrowly defined in the proposed code.¹⁵

We come then to questions about the most notable provisions of the proposed code, limiting adjudicatory proceedings more strictly than under the Administrative Procedure Act. There is, for example, a requirement that the pleadings conform as nearly as may be to the requirements of pleading in the United States district courts.¹⁶ I will not take part of my limited time to comment on that, but it raises real questions, I believe, and you can consider what you think of it. Especially on judicial review it might give rise to difficulties because of the questions that might be raised.

There is also a provision in the proposed code that in adjudication other than the kind that is rule-making under the Administrative Procedure Act today "the rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil non-jury cases in the United States district courts."¹⁷ In today's rule-making which would

¹³ Proposed code, §1007(b).

¹⁴ Proposed code, §1003(b).

¹⁵ *Ibid.*

¹⁶ Proposed code, §1004(a).

¹⁷ Proposed code, §1006(d).

become adjudication under the Code, "any reliable and probative evidence shall be received."¹⁸ One immediately asks: why should reliable and probative evidence be excluded in any proceedings by reference to district court practice—if, indeed, that practice would exclude it? It is unnecessary to talk at length about this point with Kenneth Davis here, for he has dealt fully with it¹⁹ and will doubtless state his views. The issue is one which raises grave questions.

The Code would provide, as to the so-called separation of functions, that the presiding officer in adjudication would be isolated from all consultation at the stage of formulating an initial decision.²⁰ The provision also embraces agency heads at the reviewing stage and specifies that at these stages there shall be no consultation "with any person or party on any issue of fact or law in the proceeding," except that the agency heads or agency members at the reviewing stage may consult with agency personnel who have not participated in the proceeding in any manner, have not performed investigative functions in the same or a related case, and are not engaged for the agency in any prosecutory functions. The hearing commissioner who has sat in the hearing and who must decide the case in the first instance is in effect required to seal himself in a chamber with the record and reach a decision. Of course, he can step out and consult a dictionary or some other work in the library, but when it comes to people, he is not to talk with anybody about the case. And it is clear that "anybody" includes in this Code the members of agency staffs.

We all know that judges are not subject to any such strict control as this. We rely on judicial ethics to guard against improper consultation on issues of fact in the case, but we allow the judges to consult as well as to read books on matters they may judicially notice. And, of course, they talk with lawyers or others on issues of law that are troubling them, if they think they can decide a case better by doing so. The hearing commissioner, however, is not to have any such facilities under the Code, and he is to be denied them in an agency framework created for the very purpose of making the expertness of a qualified staff available in the solution of the agency's problems. Of course it is true, as Whitney Harris would be quick to point out, that staff expertness can come into the record *via* testimony, memoranda, or exhibits which have been introduced as evidence at the hearing, and that if the hearing commissioner wants help after he starts grappling with the decision he can re-open the hearing and receive advice in that manner. The question is whether it is necessary or desirable to impose this much more cumbersome procedure upon the hearing commissioner at that point.

I will leave this particular matter there, because it is one you may

¹⁸ *Ibid.*

¹⁹ Davis, *Evidence*, 30 N.Y.U.L. Rev. 1309 (1955).

²⁰ Proposed code, §1005(c).

well want to discuss. But it goes to the essence of the question the proposed code presents, of whether we must tie down supposedly expert agencies to the degree recommended in order to protect the interests with which the agencies deal.

There is also the provision, to which Whitney Harris has referred,²¹ which limits the basis on which an agency in a formal adjudicative proceeding can reverse the hearing commissioner on questions of evidentiary fact. That has been toned down in the proposed code from the Task Force's original proposal, which would have limited the agency on all questions of fact and have required it to accept the conclusions of the hearing commissioner unless they were clearly erroneous. Now the proposal is that the agency may freely overturn the hearing commissioner's conclusions of fact other than evidentiary fact, but his conclusions of evidentiary fact must stand unless they are contrary to the weight of the evidence. Well, the proposed rule seems reasonable at first blush, but a good deal of discussion would be necessary to resolve satisfactorily the questions it raises. The aspect that bothers me most about it is the likelihood of increased litigation; for it would often be possible on judicial review to raise the issue of whether the agency had presumed to overrule the hearing commissioner on a question of evidentiary fact, where the weight of the evidence was with him. I seriously doubt the desirability of subjecting an agency decision to the hazards of reversal at the hands of the courts on that ground.

We come now to the provisions affecting judicial review. Whitney Harris has mentioned one of major importance. It would change the ground for reversing an agency determination of fact from the ground now stated in the Administrative Procedure Act—that the determination may be reversed if it is not supported by substantial evidence—to the formula now applicable to appellate review of non-jury district court determinations of fact, whereby determinations which are clearly erroneous on the whole record may be reversed.²² Nobody knows just what the change would amount to. It is possible to argue that there would not be much change in the long run, because the courts are so disposed to defer to agency expertness and so unwilling to assume the burden of substituting their judgment in these matters for agency judgment that the decisions would come out pretty much where they do today. But it is true, on the other hand, that the Supreme Court has explicitly said that the clearly erroneous formula in anti-trust cases, for example, produces a broader scope of review than does the substantial evidence rule as applied to Federal Trade Commission decisions.²³ And presumably the courts would be bound to give effect to the evident legislative intention of establishing broader judicial review if the new formula were to be enacted. It would probably

²¹ Proposed code, §1007(c).

²² Proposed code, §1009(f).

²³ See *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

require decades of litigation to determine what change had really been made. I submit that there is nothing in the record of judicial review of the past fifteen or twenty years that requires the substitution of something new and uncertain for the net result of the evolution that has by now reasonably well defined the scope of judicial review under the present statute.

The proposal would also broaden somewhat the possible ground of reversal with regard to the exercise of administrative discretion. An abuse or clearly unwarranted exercise of discretion would now become a ground for judicial reversal,²⁴ as contrasted with arbitrary and capricious action and abuse of discretion under the present act.²⁵

The proposed code would also enlarge the opportunities for judicial intrusion into administrative proceedings before final decisions are reached. One provision would permit the courts to stop agency investigations either when the agency comes to court seeking enforcement of a subpoena or in a new type of proceeding to enjoin agency investigations.²⁶ In both kinds of proceedings the courts would be authorized to determine not only whether the agency had jurisdiction to make the investigation, but also whether the investigation was really within the agency's authority. I submit that it would be extremely bad, with the information-gathering work of the agencies as important as it is, to allow the courts to exercise such potentially lethal control and to enable private parties to test agency authority at the investigative stage. Even when the agency won in the end, its processes would have been seriously impeded.

The proposed code would permit a court when invoked by a private interest to require an agency to proceed with expedition to decide a matter before it.²⁷ If the agencies are going to be responsible for running their show, as it seems to me they should be, I do not believe it would be desirable to have the courts from out somewhere telling them to get busy and move faster, however, much justification there may be for that from time to time. Such a function may even be beyond the constitutional province of the courts except in extreme cases where mandamus might historically have been applied.

In the proposed code there is also a provision that would permit injunction suits to be filed and injunctions to issue at any time against proceedings "clearly beyond the constitutional or statutory jurisdiction or authority of the agency."²⁸ This provision would narrow the application of the rule requiring exhaustion of administrative remedies before an agency can be enjoined. In effect it would say: "If a party thinks an agency proceeding may plausibly be alleged to be clearly beyond the constitutional or statutory jurisdiction or authority of the agency, he may go

²⁴ Proposed code, §1009(f).

²⁵ 60 STAT. 243 (1946), 5 U.S.C. §1009(e) (1952).

²⁶ Proposed code, §1005(a), (b).

²⁷ Proposed code, §1005(d).

²⁸ Proposed code, §1009.

into court and seek to enjoin what it is doing before it has reached its decision in the matter." The present narrowly interpreted rule that an agency may be enjoined from exceeding its jurisdiction by someone threatened with irreparable injury would be indefinitely broadened. Even though the agencies were to win 99 out of 100 of the cases under this provision, they could be seriously impeded in their work by the suits themselves.

I submit that before we advocate legislation of the character of the proposed code we had better think pretty hard, in the light of the prospects for governmental regulation in the years just ahead, about whether improvement would really result. I think this Code misconceives the principal problems that should concern us in relation to administrative processes. The philosophy behind the Code is that if we can judicialize agency proceedings we will be better off. The proposal is to add to judicialization at two principal points, first by making the hearing commissioner a judge in the real sense of the word, exercising authority before a proceeding reaches the agency heads, and second, by imposing an enlarged control by the courts over the agencies. The agency heads would be placed between an upper and a lower millstone. They would have to submit a great deal to the authority of the hearing commissioners, and they would have to submit a great deal to the courts.

Our principal problem, as I see it, is not to get whatever increase in fairness such judicialization might accomplish, but to secure agency heads who are competent. Most of the real cause of trouble is at the top. Many lawyers are disturbed by things that are happening in the administrative world because of deficiencies at the level of the agency heads. Not knowing what else to do, they apply legal precepts and try to tinker with the procedures, but the attempt is partially futile and may result in more harm than good.

The main problem in getting qualified agency heads is, of course, political and is not within our province. But, I submit, we are going to make it harder to get good agency heads if we subject their work to procedures that will hamstring them. If we want good commissioners and good bureau chiefs or whatever, we have to offer them working conditions that promise some measure of success in what they are asked to do. I think, in our zeal to protect private interests, we had better be pretty careful these days lest we make effective government impossible.